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4	Petition of)	
5	Lincoln County, Oregon, and the)	CCB 25. 97-241
6	Economic Development Alliance of)	
7	Lincoln County, a non-profit corporation,)	REPLY COMMENTS OF
8	for Declaratory Ruling and Preemption)	LINCOLN COUNTY
9	Pursuant to Section 253 of the)	AND THE ECONOMIC
10	Communications Act of 1934)	DEVELOPMENT
11	of Certain Provisions of the Oregon)	ALLIANCE
12	Telecommunications Utility Law)	

In addition to comments filed by the petitioners, the following entities have also filed Comments in this proceeding: (1) Oregon PUC; (2) GTE; (3) SBC Communications; and (4) UTC. The following is the petitioners' brief reply to those comments.

1. Oregon PUC

Much of the Oregon PUC comments explain how the Oregon PUC decision was a correct application of Oregon telecommunications law. The petitioners disagree with that interpretation, and have filed a separate state court appeal challenging that decision. However, whether or not the Oregon PUC interpretation of Oregon law was correct or incorrect is not subject to review by the Commission. The Communications Act does not empower the Commission to overrule a state PUC interpretation of state law (even if plainly wrong, as in this case), and the petitioners are not asking the Commission to do so. However, the Communications Act does empower the Commission to *preempt* state laws and regulations (as interpreted and applied by state PUC's) which are inconsistent with the Act.

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The Oregon PUC suggests that the Oregon PUC decision raises legal disputes which are "unique to Oregon and are of no concern to the FCC." That comment totally misses the mark. A state law or regulation which imposes an unnecessary and unjustified entry barrier to the provision of telecommunications service is, as a matter of law, a concern to the FCC.

The Oregon PUC also suggests that the petitioners' CoastNet proposal has been "fluid and unclear in the details." That is simply not correct. The petitioners have clearly and repeatedly expressed the essential details of the proposed CoastNet system. To the extent that some of the details in the application became further refined through the Oregon

PUC process, those refinements were the direct result of meetings with Oregon PUC staff, which resulted in futile attempts by the petitioners to structure their application in a manner

that would be acceptable to the Oregon PUC.

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As in the original Oregon PUC decision, the Oregon PUC again relies upon Section 253(d) to save their decision.³ The Oregon PUC asserts that Oregon PUC licensing of the CLPUD's dark fiber would help "ensure that the public end-users receive quality service, and that the providers, like CLPUD, are accountable for problems which may arise with their network." However, the Oregon PUC has yet again failed to explain how this is so. The County and the Alliance assert that, under the Oregon telecommunications regulatory scheme, this statement is incorrect. Oregon PUC licensing of the CLPUD's dark fiber will accomplish nothing, much less accomplish anything which can be saved by Section 253(d).

¹ Comments of Oregon PUC, at 2.

² Comments of Oregon PUC, at 2.

³ Comments of Oregon PUC, at 6-7.

⁴ Comments of Oregon PUC, at 6. Page 2 – COMMENTS OF LINCOLN COUNTY AND THE ALLIANCE

The petitioners do not oppose Oregon PUC licensing of their own CoastNet
activities, and would be accountable to consumers pursuant to Oregon PUC rules and
regulations (even when a problem arises from the CLPUD's dark fiber). This is true for any
telecommunications service provider that purchases or leases facilities (including fiber) from a
non-licensed third party. One analogy is switching software programs used by local exchange
carriers (LECs). Many of these programs are merely licensed to LECs, and the software
provider retains ownership. The Oregon PUC has never attempted to regulate these software
providers. If a problem with a customer's service occurs as a result of a flaw in the software,
the LEC is accountable to the customer under the Oregon PUC's service quality rules. The
Oregon PUC does not need to regulate or license the software vendor in order to protect the
end user. Another analogy is resellers of telecommunications services who have no control
over the underlying facilities, and who are routinely licensed by the Oregon PUC. If the
customer of a reseller complains, the Oregon PUC looks to the reseller for accountability, not
to the underlying provider. Under Oregon law, reseller applicants are not required to make
any affirmative showing regarding the regulatory status of the underlying facilities provider.
The Oregon PUC also fails to effectively respond to the Oregon PUC's
discrimination against the petitioners by having previously granted a license to another
provider who proposes to use the CLPUD's excess dark fiber optic capacity. The only

possibly take some action.⁵

response of the Oregon PUC is that they may choose to look at that other license, and

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⁵ Comments of Oregon PUC, at 11. However, the Oregon PUC's own rules narrowly restrict the conditions under which the Oregon PUC may revoke a license. See Oregon Administrative Rule § 860-032-0015.

2. GTE

The comments of GTE are irrelevant.

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As they did before the Oregon PUC, GTE focuses on the status of the CLPUD, and their lack of legal power to engage in telecommunications service.⁶

However, the Oregon PUC decision to deny the applications of the County and the
Alliance was not based upon the lack of CLPUD power to engage in telecommunications
service. Whether or not the CLPUD has that power may never be determined, because the
CLPUD has made it clear to the petitioners and the Oregon PUC that, although the CLPUD
is graciously willing to let the petitioners utilize excess CLPUD dark fiber capacity for
CoastNet, the CLPUD has absolutely no intention of submitting an application for an
Oregon PUC license to engage in telecommunications service.

The fact is that the Oregon PUC decision to deny the petitioners' request was based upon the Oregon PUC's strained interpretation of state law to require that each component part of a telecommunications network be licensed by the Oregon PUC. It is that determination which violates the Communications Act, and should be preempted by the Commission for the reasons outlined in the petition and comments previously submitted by the petitioners.

⁶ GTE characterizes People's Utility Districts as creations of the Oregon legislature. Actually, they are creations of the Oregon Constitution. Oregon Constitution, Article XI, § 12.

Before the Oregon PUC, GTE also asserted that the County lacked authority to engage in telecommunications service. However, in Oregon, a county has broad statutory home rule power over all matters of local concern. Oregon Revised Statute §§ 203.010 and 203.035. In any event, the Oregon PUC simply did not base its decision on the lack of power of the County or the CLPUD to engage in telecommunications service. On the contrary, the Oregon PUC specifically invited the CLPUD to apply for a license to engage in telecommunications service.

⁷ CLPUD was not a participant in the proceedings before the Oregon PUC, and is not a participant in these proceedings or the appeal from the Oregon PUC decision pending in state court.
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3. SBC Communications

2	Like GTE, the comments of SBC focus on the power of the Commission to interfere
3	with state restrictions on its own political subdivisions. However, those comments are
4	irrelevant to this proceeding for the same reasons that the comments of GTE are irrelevant:
5	The Oregon PUC did not base its decision on the lack of County or CLPUD power to
6	engage in telecommunications service (and, in any event, the County has that power, and the
7	CLPUD doesn't need that power).
8	4. UTC
9	The comments of UTC are exactly on point. UTC's comments address the real
10	issues presented in this case, and the appropriate method of analysis. Therefore, the

CONCLUSION 12

petitioners fully support those comments.

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For the reasons previously recited in the petition, comments of the petitioners, and comments of UTC, the Commission should preempt Oregon law (as interpreted by the Oregon PUC) to the extent that it requires state licensing of the dark fiber component of a telecommunications network.

DATED this 21st day of January, 1998.

Rob Bovett, OSB 91026 **Assistant County Counsel** Attorney for Petitioner Lincoln County 225 West Olive Street, Room 110 Newport, OR 97365 (541) 265-4108

DATED this 21st day of January, 1998.

mnchero / KEB Mark Trinchero, OSB 88322

Attorney at Law

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CERTIFICATE OF MAILING AND SERVICE

2	CERTIFICATE OF MAILING				
3	I hereby certify that on January 21, 1998, I mailed the original and six copies of the				
4	foregoing REPLY COMMENTS OF LINCOLN COUNTY AND THE ECONOMIC				
5	DEVELOPMENT ALLIANCE to the Federal Communications Commission by placing that				
6	original and those copies in a sealed envelope addressed as follows:				
7	Secretary, FCC				
8	1919 M Street, NW				
9	Washington, DC 20554				
10	CERTIFICATE OF SERVICE				
11	I also certify that on January	y 21, 1998, I mailed a copy of the foregoing REPLY			
12	COMMENTS OF LINCOLN CO	UNTY AND THE ECONOMIC DEVELOPMENT			
13	ALLIANCE to:				
14					
15	Janice M Myles				
16	Common Carrier Bureau				
17	FCC, Room 544				
18	1919 M Street, NW				
19 20	Washington, DC 20554				
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25	Salem, OR 97310	Newport, OR 97365			
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Page 1 -- CERTIFICATE OF SERVICE

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DATED and MAILED this 21st day of January, 1998.

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